COLUMBIA LAW REVIEW.

Vol. XVI. JANUARY, 1916. No. 1

UNLAWFUL POSSESSION OF INTOXICATING LIQUORS AND THE WEBB-KENYON ACT.

Recent legislation[1] which forbids the possession of more than a specified quantity of intoxicating liquors, irrespective of intent, seems to indicate that, after twenty-five years of incompetence, states which are attempting to enforce their prohibition laws, may no longer be hampered, in making their regulations effective, by the protection which the commerce clause of the federal Constitution affords to shipments from without the local jurisdiction. The hitherto ineffectiveness of state measures, it may be said very briefly, has resulted from the fact that, even under the Wilson Act,[2] there could be no interference with a shipment of intoxicating liquor from without the state until it had reached the consignee,[3] thus making it possible more easily to evade the state laws against sale. A solution of the difficulty has been possible since March 1, 1913 when Congress, in an effort to give the states adequate power, passed the Webb-Kenyon Act[4] which excludes from interstate commerce every shipment of intoxicating liquor intended to be used in violation of the law of destination, the theory being that the federal protection will thus be taken from every such shipment, and that the police power of the state will be unhampered.[5]

If the Webb-Kenyon Act was intended, *ex proprio vigore*, to solve the difficulty, its advocates were sadly misled. Further-

[1]"Bonner Anti-Shipping Law," Acts of Alabama, 1915, No. 10 (passed January 27, 1915).

[2]Act of August 8th, 1890, 26 Stat. 313.

[3]Rhodes *v.* Iowa (1898) 170 U. S. 412.

[4]Act of March 1, 1913, 37 Stat. 699.

[5]See my paper, "The Power of the States over Commodities Excluded by Congress from Interstate Commerce" 24 Yale Law Journal 567 (May, 1915).

more, state courts seem to have been impressed with the idea that the Webb-Kenyon Act empowers almost every kind of local regulation, and some of the decisions have been clearly erroneous. In several cases the courts totally disregarded the condition that obviously must exist before the Webb-Kenyon Act may even be referred to, namely, an intent to violate a valid law of the state of destination, and even, in some instances, declared that the state had an absolute right to forbid the delivery and receipt of *all* intoxicating liquors. This makes some local regulations effective for the time, but they are none the less unconstitutional, and few states have passed legislation which seems valid, yet completely efficacious, under the federal statute.[6]

The undoubted aim of the states is to exclude all shipments of liquor that may be sold or used in violation of law, and it has been suggested that the best way of making local regulations completely effective, while not interfering with interstate commerce, would be for the states to pass laws forbidding the possession, irrespective of intent, of more than a specified quantity of intoxicating liquors. If a state can constitutionally do this, then every shipment in excess of the specified amounts would be with intent to violate the law against possession, the Webb-Kenyon Act would take away federal protection, and the state could do anything it liked with that particular shipment; there would be no federal right to engage in such interstate commerce. A law attempting this solution has been passed by the legislature of Alabama and sustained by the state Supreme Court.[7]

My purpose in this paper is to examine some of the recent decisions under the Webb-Kenyon Act, to show the unconstitutionality of some existing legislation, to explain just how laws, such as that of Alabama, would validate some of these unconstitutional provisions, and to consider briefly the constitutional question involved in making possession criminal, irrespective of intent, for there is some, but, I venture, not controlling, authority contrary to the Alabama decision.

I. INOPERATIVE AND INEFFECTIVE STATE LEGISLATION.

In the first case[8] to be decided by it, the Supreme Court of the United States refused to apply the Webb-Kenyon Act. The

[6]See my paper, "State Legislation under the Webb-Kenyon Act" 28 Harvard Law Rev. 225 (January, 1915).

[7]Southern Express Co. *v.* Whittle (Ala. June, 1915) 69 So. 652.

[8]Adams Express Co. *v.* Kentucky (1915) 238 U. S. 190.

state enactment in question forbade the transportation of intoxicating liquors into dry territory; it was inoperative as applied to interstate shipments before the passage of the Webb-Kenyon Act,[9] but subsequently it was urged that the federal statute removed the protection even when the shipments were for personal use, a disposition permitted under Kentucky legislation. The Supreme Court of the United States held, however, "that, inasmuch as the facts of this case show that the liquor was not to be used in violation of the laws of the state of Kentucky, as such laws are construed by the highest court of that state, the Webb-Kenyon law has no application and no effect to change the general rule that the states may not regulate commerce wholly interstate." This approved the holding of the Kentucky Court of Appeals.[10]

To decide this case it was not necessary for the Supreme Court of the United States to declare definitely the scope of the Webb-Kenyon Act, but the duty may, perhaps, not be avoided when the Court decides the cases, already argued, which concern the relation of the federal statute and the local regulations of West Virginia. Three cases came before the lower federal courts. The District Court for the Southern District of West Virginia denied the state an injunction restraining an express company from delivering liquors ordered from without the state by a citizen of West Virginia for his own use.[11] This decision was reversed by the Circuit Court of Appeals for the Fourth Circuit.[12] Meanwhile, the District Court for the District of Maryland held that the defendant railway company could be compelled to transport liquor from Maryland to consignees in West Virginia, for their personal use,[13] but when the Circuit Court of Appeals rendered its decision, the case in the District Court was reargued, and Judge Rose, out of deference to the higher tribunal, reversed

[9]Louisville etc. Ry. *v.* Cook Brewing Co. (1912) 223 U. S. 70.

[10]In this case the fine imposed was not large enough to give jurisdiction to the Kentucky Court of Appeals, but under identical facts, this tribunal made a similar holding, quoted and approved by the United States Supreme Court; see Adams Express Co. *v.* Commonwealth (1913) 154 Ky. 462, and 28 Harvard Law Rev. 229.

[11]State of West Virginia *v.* Adams Express Co. (D. C., S. D. W. Va. 1914) 219 Fed. 331.

[12]State of West Virginia *v.* Adams Express Co. (C. C. A. 4th, 1915) 219 Fed. 794.

[13]Clark Distilling Co. *v.* Western Maryland Ry. (D. C., D. Md. 1914) 219 Fed. 333.

his decision.[14] It will be more convenient, in attempting to ascertain the validity of the state legislation, to consider the decision of the Circuit Court of Appeals.

It was based on that provision of the West Virginia law which forbade sales of intoxicating liquors within the state, and then declared (sec. 3) that "in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent, or employé." The Court paraphrased the Webb-Kenyon Act as prohibiting "the shipment or transportation of liquor from one state into another, not only when it is intended to be sold in violation of any law of such state, but when it is to be received or possessed or in any manner used in violation of the state law." This is all very true, but the Court went on to declare the act "a direct recognition of the right of the state to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing on the power of Congress to regulate interstate commerce. The state of West Virginia has enacted with reference to a contract for the sale of liquor that 'the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee,' and it expressly forbids a sale within the state. This makes the receipt or delivery have the effect of a sale and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. . . . Any other construction would not only distort the language but continue the obstacles to the enforcement of state prohibition laws which it was the manifest intention of the Congress to remove."

Let us leave the Webb-Kenyon Act out of consideration for the moment and see what law of the state was going to be violated by the shipments which were enjoined. It was a law against sale, since the statute made the place of delivery, in West Virginia, the place of sale. But it is well settled that the state of delivery cannot be made the state of sale, even as to C. O. D. shipments of intoxicating liquor,[15] and the shipments sought to be enjoined were, therefore, with intent to violate an unconstitutional law of

[14]Clark Distilling Co. *v.* Western Maryland Ry. (D. C., D. Md. 1915) 219 Fed. 339.

[15]Adams Express Co. *v.* Iowa (1905) 196 U. S. 133; Adams Express Co. *v.* Kentucky (1907) 206 U. S. 129; see also State *v.* Herring (1907) 145 N. C. 418, and State *v.* Patterson (1904) 134 N. C. 612.

the state; obviously, under these circumstances, the Webb-Kenyon Act could not apply. The decision of the Circuit Court of Appeals thus made a positive prohibition of certain interstate commerce—for this is what the Webb-Kenyon Act undeniably is—vest the states with power over shipments that did not come under it. If a state is, under any circumstances, competent to fix the situs of interstate sales, its regulations may apply only to those shipments that come under the Webb-Kenyon Act, and the *sine qua non* for this statute to operate is that these shipments are intended to violate a law of the state. This law, to repeat, may not be one fixing the place of sale.[16]

Although not necessary for its decision of the case, the Circuit Court of Appeals held that the right of the state to an injunction was reinforced by the fact that the sales were induced by solicitation through circulars and price lists, which is unlawful under the West Virginia law, even when the mails are used, and the sender remains in another state. The Court said: "It makes no difference that the United States mail was used for the solicitation [of orders for intoxicating liquors]. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses."

In *Adams* v. *The People*[17]—the case probably meant but not cited by the last clause of the quotation—there was an indictment for obtaining money under false pretenses, although the defendant

[16]An appeal has been taken from the decision of the District Court for the District of Maryland, and before the United States Supreme Court, counsel for the Distilling Company argued that the West Virginia Law does not undertake to prevent the carriage and delivery of interstate shipments to consignees who have purchased them outside of the state for their personal use, and that the place of delivery was not made the place of sale of shipments intended for personal use. If there was any merit in these contentions, it has been made nugatory through the passage of subsequent, unambiguous legislation; and, in any event, the contentions are of interest as presenting only questions of state statutory construction, and not of the scope of the Webb-Kenyon Act and the local regulations possible under it. For the argument as to construction, see Brief for James Clark Distilling Co., Supreme Court of the United States, Oct. Term, No. 858. On November 29, 1915 the Supreme Court assigned next February 21st for a reargument of these cases (Nos. 857 and 858).

[17](1848) 1 N. Y. 173.

was a resident of Ohio and had never been in New York. So also, in cases referred to by the Circuit Court of Appeals, solicitation through the mails of orders for intoxicating liquors has been punished where the matter was mailed and received within the limits of a state and there was no interstate commerce involved.[18] Moreover, the Supreme Court decisions cited by the Circuit Court of Appeals simply hold that Congress may make the use of the mails a crime when in furtherance of a purpose to violate federal laws and are obviously not precedents for sustaining the West Virginia legislation.[19]

Now, it will be accepted without question, I think, that before solicitation by means of the post office may be forbidden, the sale of the intoxicating liquors must constitute a crime. The Circuit Court of Appeals evidently reasoned on this basis, considering as constitutional the provision fixing the situs of the sale, but, as I have attempted to demonstrate, this provision is invalid. Therefore, the solicitation cannot be made a crime; it must be in furtherance of a purpose that is unlawful.

This is true as a general proposition; any other conclusion would permit the states to attach any conditions they might see fit to the use of the mails. But the case nearest in point—which is not cited by the Circuit Court of Appeals' opinion—suggests an additional reason for the invalidity of the West Virginia legislation.[20] The defendant corporation in Tennessee mailed circulars advertising liquors to residents of Barton County, Ga. The Georgia law forbade solicitation where it was unlawful to sell, but the Supreme Court held that since shipments could be made from without the state under the protection of the commerce clause, it could not be a crime to use a federal agency in furtherance of a purpose that was sanctioned by the federal Constitution.[21]

In one other important case—*Ex parte Peede*[22]—the Texas Court of Criminal Appeals reasoned correctly, although there was a strong dissent which was vitiated by the error of not holding

[18]Hayner *v.* State (1910) 83 Ohio St. 178 and Zinn *v.* State (1908) 88 Ark. 273.

[19]*In Re* Palliser (1890) 136 U. S. 257 and United States *v.* Thayer (1908) 209 U. S. 239.

[20]Rose Co. *v.* State (1909) 133 Ga. 353, 36 L. R. A. [N. S.] 443 and note which declares the case to be one of first impression; but see the contrary holding in the court below, Rose *v.* State (1908) 4 Ga. App. 588.

[21]Certain other features of the West Virginia legislation will be considered later.

[22](Tex. Crim. App. 1914) 170 S. W. 749.

that the law to be violated by a particular shipment must be valid irrespective of the Webb-Kenyon Act. There were several questions as to the construction of the state statute, and some dicta that are incorrect, but the Court properly held that when liquors were not intended to be sold, and were imported for lawful use and possession, one who delivered the liquors in violation of the law could not be punished. This was true, the court said, because the state regulation simply followed the Webb-Kenyon Act and made delivery a crime when the subsequent disposition was unlawful. The dissenting opinion, rather convincingly, held that the legislature had made delivery in every case a crime, and went on, unconvincingly, to declare that such a regulation was constitutional. An intent to violate this law thus brought every shipment that was delivered under the Webb-Kenyon Act. The dissenting opinion, however, as did the decision of the Circuit Court of Appeals, overlooked the fact that, apart from the federal statute, the state has no power to prevent delivery, since the shipment is not completed until it reaches the consignee.

The local regulations of North Carolina have several times been before the Supreme Court of that state, but only one case, *State* v. *Seaboard Air Line Ry.*,[23] presents any question of interest in the present discussion.[24] The legislature passed a law requiring every carrier doing business within the state to keep a separate book, and to enter therein the name of the person to whom the shipment was made, the amount and kind, the date both of receipt and delivery, and the name of the employee who made the delivery. The receipt of every shipment had to be attested by the signature of the consignee.

It was held "an established principle that, when a statute contains a definite grant of power, it will be so construed as to authorize all things necessary to accomplish the expressed purpose of the grant." The Webb-Kenyon Act should "be held to confer upon the state authorities the right to make the rules and regulations required and reasonably designed to make such power

[23](N. C. 1915) 84 S. E. 283.

[24]See also Smith *v.* Southern Express Co. (1914) 166 N. C. 155; Southern Express Co. *v.* City of High Point (1914) 167 N. C. 103 and Taylor *v.* Commonwealth (Va. 1915) 85 S. E. 499. In State *v.* Cardwell (1914) 166 N. C. 309, the separate opinion by Chief Justice Clark (agreeing in the result) asserted that under the Webb-Kenyon Act the state has the same power over liquor shipped in interstate commerce, as it has over liquors locally manufactured,—a contention which the reasoning of this paper denies.

effective." But the federal statute is a positive prohibition of interstate commerce; it contains no grant of power, the theory being that the authority of the state may attach, unchecked by the plea of interference with interstate commerce, to the shipments barred by the Act. The reasoning of the North Carolina court, therefore, would seem to apply only to these forbidden shipments, and the state would have power to compel publicity with regard to them. As to all other shipments, the regulation would have to be considered as a proper police measure, and not as a direct burden on interstate commerce, or it would be invalid.[25]

It is evident, from the cases just considered and from those which were treated in my earlier review, that many state laws are either ineffective or unconstitutional, since it is sought to apply them, not simply to those shipments which come under the Webb-Kenyon Act, but to all importations into the state. As to those which are not with intent to violate a valid local law, the authority of the state is no greater than before the passage of the Webb-Kenyon Act; and the fact that there is a good deal of unconstitutional legislation, is evidence, not simply of inefficient bill-drafting, but of a desire to make the local regulations completely effective. Undoubtedly, the aim of the prohibition states is to keep out every shipment that is going to be sold in violation of the law, and, frequently, detection is easy. If a carload of beer, for example, is shipped into a dry state, it is clear that there is an intent to violate the law,[26] but the transaction that the local authorities wish most to prevent, is the small, repeated shipment, not so much to check the *use* of intoxicating liquors, as to make effective the regulations concerning *sale*. In every case, however, before interference with the shipment is permissible, prior to receipt by the consignee, there must be an intent to violate some law. Hence, action is taken

[25]Ezell *v.* City of Atlanta (1913) 140 Ga. 197 held unconstitutional a city ordinance of much the same effect as the North Carolina Law. The basis of the decision was that the ordinance conflicted with federal commercial regulations concerning a uniform system of books to be kept by carriers under the supervision of the Interstate Commerce Commission, and forbidding disclosures by carriers to the disadvantage of the shipper. The North Carolina court dismissed this case as authority because it was decided before the passage of the Webb-Kenyon Act; but this statute is involved, and extends the power of the state, only as to *particular* shipments which are to violate a valid law. As to *all* shipments, the regulations must be judged as to their reasonableness and their conflict with federal provisions, entirely apart from the Webb-Kenyon Act.

[26]See State *v.* Doe (1914) 92 Kan. 212.

to keep out, to condemn and destroy, or to penalize the receipt of, *all* shipments, and it is claimed that this is permitted by the Webb-Kenyon Act. But, as the preceding discussion has attempted to make clear, the state has no such authority, although several courts have held otherwise.

A solution of the difficulty, that appears tolerably effective, has been arrived at in Alabama. There, the so-called Anti-Shipping Law makes criminal the transportation into the state, or the receipt by the consignee, of liquors intended to be used in violation of the law. These provisions are simply the same as those of the Webb-Kenyon Act, and need no comment. If the federal statute is constitutional, the state is competent to pass legislation of identical scope. But section 12 of the Alabama law declares it "unlawful for any person, firm, or corporation, (1) to receive or accept delivery of, or to possess or to have in possession at any one time, whether in one or more places, and whether in original packages or otherwise, more than one-half gallon of spirituous liquors, or more than two gallons of vinous liquors . . . [or more than specified quantities of other liquors]; or (2) to receive, accept delivery of, possess, or have in possession more than one gallon of spirituous liquors, or four gallons of vinous liquors . . . [or more than specified quantities of other liquors] within any four consecutive weeks, whether in one or more places."[27]

The consonance of this law with the Webb-Kenyon Act and the resulting efficacy of local regulations, are dependent on the validity of two propositions:

(1) If a state, under its power of police, may prohibit the possession of more than a specified quantity of intoxicating liquors, either at one time or within consecutive weeks, and if it may do this—*independently of the Webb-Kenyon Act*—even though the liquors are received from without the state, then

(2) Every shipment in excess of the specified amount lawful to possess at one time, every shipment which would make the amount possessed within four consecutive weeks exceed the prescribed limit, would be made with the purpose of being possessed in violation of the laws of Alabama, and is, therefore, barred from interstate commerce by the Webb-Kenyon Act. Federal protection is thus taken from every such shipment and the state can then exclude it absolutely, seize and condemn it at any time after

[27] A few immaterial exceptions are made.

the border is passed, and make criminal the receipt or delivery of such a shipment, because the consignee's right to receive has been taken away by the Webb-Kenyon Act. (A smaller shipment for illegal sale, or a larger one, for the same purpose, is, of course, banned on account of the unlawful intent.) To recapitulate, then, under the Alabama statute:

The state forbids possession of certain shipments.

The Webb-Kenyon Act then prohibits the shipments from interstate commerce and takes away the right of the consignee to receive them.

Therefore, the state can punish receipt by the consignee; but, let me repeat, the possession feature of the Alabama law must be valid independently of the Webb-Kenyon Act. Is this the case?

II. Legislation Prohibiting Possession.

The real purpose of such legislation as that of Alabama is well expressed by a leading authority who says:

"It [the state] exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through constitutional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskillful, careless, or unscrupulous."[28] The primary purpose, therefore, of laws making the possession of intoxicating liquors criminal, would not be to interfere with the liberty of the individual, but simply to make more difficult the evasion of laws whose validity is beyond all question;[29] and, in the last analysis, all prohibition laws are designed to prevent the use of intoxicating liquors.

There is little doubt, I think, that, under the decisions of the Supreme Court of the United States, the Alabama legislation is constitutional. The classic statement of the extent of the police power declares that "it may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong

[28] Freund, Police Power § 8.

[29] *Ibid.*, §§ 453-455.

and preponderant opinion to be greatly and immediately necessary to the public welfare."[30] The legislature of Alabama has deemed it to be necessary to the public welfare to prohibit the possession of more than small quantities of intoxicants.

Denunciations of the liquor traffic by the Supreme Court of the United States have been frequent, and the decisions have recognized an almost unlimited authority in the state, so far as "due process" and the "liberty of the individual" are concerned.[31] One holding goes so far as to assert that a man may be forbidden to manufacture liquor for his own use,[32] and if a state may prevent an individual from acquiring property by manufacture, it may certainly prevent him from acquiring property by purchase.

Two cases recently decided by the Supreme Court of the United States support this conclusion. *Patsone* v. *Pennsylvania*[33] upheld the power of the state to forbid the possession of a shot gun or rifle by an unnaturalized foreign-born resident. This prohibition was justified on the ground that the statute forbade the killing of wild game by any such person. "The possession of rifles and shot guns is not necessary for other purposes not within the statute," said Mr. Justice Holmes. The possession of intoxicating liquors would seem equally unnecessary.

The Supreme Court has held, secondly, that a state may prohibit sales of malt liquors which are not intoxicants. The language used would appear to be almost conclusive:

"It is also well established that, when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that, because a transaction separately considered is innocuous, it may not be included in a prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. . . . With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial

[30]Noble State Bank *v.* Haskell (1911) 219 U. S. 104.

[31]See *inter alia,* License Cases (1847) 5 How. 504; Bartemeyer *v.* Iowa (1873) 18 Wall. 129; Beer Co. *v.* Mass. (1877) 97 U. S. 25; Foster *v.* Kansas (1884) 112 U. S. 201; Mugler *v.* Kansas (1887) 123 U. S. 623; Crowley *v.* Christensen (1890) 137 U. S. 86.

[32]Mugler *v.* Kansas, *supra,* n. 31.

[33](1914) 232 U. S. 138.

relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended."[34]

So far as federal constitutional limitations are concerned, furthermore, it would seem that the state may enforce regulations against possession even when the liquors are received from without the state, and there is no interference with interstate commerce.[35] Without considering in detail the closely reasoned decisions under the Wilson Act, it may be said that this statute enabled "the states to extend their authority as to such liquor shipped from other states before it became commingled with the mass of other property in the state by a sale in the original package." Or, again, "the regulation expressly provided that intoxicating liquors coming into a state should be as completely under the control of a state as if the liquor had been manufactured therein."[36] This case upheld the power of the state to regulate the solicitation of orders for shipments from without the state of liquors for personal use. And if a state may do this, it is only by reason of its plenary power after interstate commerce has ceased, and the shipment has reached the consignee. An analogous case, supporting the conclusion here contended for, is *Silz* v. *Hesterberg*,[37] which sustained a state statute forbidding the possession of wild game, even though brought in from a foreign country; and here there was no Wilson Act to remove an impediment to state action.

There are, however, some state decisions which are generally cited as holding that to prohibit the possession of intoxicating liquors, irrespective of intent, is an unwarranted interference with the liberty of the citizen. The leading case is *State* v. *Gilman*,[38] which was based on the clause of the West Virginia Constitution which authorizes the legislature to pass laws "regulating or prohibiting the sale of intoxicating liquors within the limits of this state."[39] The court held that this was "an implied inhibition to the exercise of any authority in respect to that subject which is

[34]Purity Extract Co. *v.* Lynch (1912) 226 U. S. 192; see also State *v.* George (1915) 136 La. 906.

[35]This proposition must be maintained without considering the Webb-Kenyon Act.

[36]Delamater *v.* South Dakota (1907) 205 U. S. 93.

[37](1908) 211 U. S. 31. It should be remarked, however, that the doctrine of *ferae naturae* played some part in the decision of this case.

[38](1889) 33 W. Va. 146.

[39]Art. 6, sec. 46.

not embraced in the grant," and declared unconstitutional a law which made it a crime to "solicit or receive orders for, or keep in his possession for another" any intoxicating liquors. The authority of the case, by reason of this constitutional provision, does not extend outside of West Virginia.

So, the constitution of Kentucky empowers the legislature to provide a means whereby the sense of the people of any district may be taken on the question of regulating or prohibiting the "sale" of intoxicating liquors, and it is further provided that "the General Assembly shall prescribe such laws as may be necessary for the restriction or prohibition of the sale or gift of spirituous, vinous, or malt liquors on election days." Assuming that a town council had as much police power as the General Assembly, the court held invalid a local ordinance making it unlawful for any person to bring within the town, even for personal use, more than a quart of intoxicating liquor. While the point to be decided was simply as to the validity of this municipal ordinance, the opinion rested on the ground that it was not competent for the legislature "to prohibit a citizen from having in his own possession spirituous liquors for his own use."[40] However, on account of what the court deemed a restricted grant to the legislature, the case is not necessarily authority outside of Kentucky.[41]

In *State* v. *Williams*,[42] however, the Supreme Court of North Carolina held that "when the Legislature makes it an indictable offense to carry more than a certain quantity [of intoxicating liquor] into a specified county, within a limited time, prohibiting its sale and not prohibiting its use, but authorizing its use for certain purposes, it is unconstitutional, for that is a taking of property without due process of law, and not within the police power of a State." But, as the Mississippi Supreme Court has pointed out in a very recent decision,[43] the North Carolina major-

[40]Commonwealth *v.* Campbell (1909) 133 Ky. 50.

[41]The court said however: "The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed to him by the constitution, and cannot be abridged as long as the absolute power of a majority is limited by our present constitution." The court quoted a page from Blackstone on the absolute and relative rights of man and two pages from Mill's Essay on Liberty. This was in 1909! It may be added that the case has been followed by later decisions. See Com. *v.* Smith (1915) 163 Ky. 227.

[42](1908) 146 N. C. 618 (see headnote).

[43]State *v.* Phillips (Miss. 1915) 67 So. 651.

ity opinion was accompanied by a strong dissent which propounded a question "hard to answer": " . . . if the manufacture, though exclusively for one's own use and out of one's own apples and peaches, in the county can be forbidden by statute without breaking the Constitution, why cannot the importation of the same article across the county line, in a greater quantity than half a gallon per day, even for one's own use, be prohibited by the same power? The truth is that the legislature having jurisdiction of the subject, the limitations upon its exercise rest in the wisdom and sound judgment of the legislature, subject only to review by the people, not by the courts."

The North Carolina decision is the only one which does not rest upon some particular provision of the state constitution regarding the powers of the legislature. There are, to be sure, cases which hold that municipal corporations have not the right to forbid possession, but these furnish no authority against the power of the legislature.[44] And there are, finally, a number of cases holding that the legislature has power, either to forbid possession or to take other measures of a more radical character.[45]

It would seem, therefore, that there is slight, if any, authority for holding that legislation such as that of Alabama takes property without due process of law or interferes with the liberty of the citizen.[46] Logically, such a contention would seem to be impossible. If Congress were to exclude all intoxicating liquors from interstate commerce, then to prevent manufacture would be equivalent to preventing possession. If, therefore, it is maintained that forbidding the possession of more than a specified quantity of intoxicating liquors denies due process, this constitutional guarantee must be made to depend upon the freedom of commerce between the states, and that is a logical absurdity.[47]

---

[44]The leading case is Eidge *v.* City of Bessemer (1909) 164 Ala. 599, which is no longer authority by reason of the recent decision of the Alabama Supreme Court sustaining the possession feature of the Anti-Shipping Bill, Southern Express Co. *v.* Whittle, *supra,* n. 7. Other cases are Henderson *v.* Heyward (1899) 109 Ga. 373; Sullivan *v.* Oneida (1871) 61 Ill. 242.

[45]See, *inter alia,* Easley *v.* Pegg (1901) 63 S. C. 98; Cohen *v.* State (1909) 7 Ga. App. 5; Selma *v.* Brewer (1908) 9 Cal. App. 70; State *v.* Clark (1854) 28 N. H. 176; Heisembrittle *ads.* City Council (S. C. 1842) 2 McMull. 233.

[46]See, *passim, Ex parte* Brown (1897) 38 Tex. Cr. 295, and Titsworth *v.* State (1909) 2 Okla. Cr. 268.

[47]There are, of course, many cases which declare it proper for the state to make the possession of certain quantities *prima facie* evidence of intent to violate the law, or possession for sale criminal. See Fitzpatrick

III. Legislation Penalizing Receipt.

The decision of the Supreme Court of Alabama,[48] upholding the constitutionality of the provision which makes possession a crime, contains an able statement of the scope of the police power with reference to intoxicating liquors, but is not at all clear as to the manner in which the state legislation operates under the Webb-Kenyon Act. In fact, it would seem that although the court reached a conclusion which this article accepts as correct, the reasoning was erroneous.

"The plain terms of the statute," says the decision,[49] "inhibit any right to enter intoxicants in interstate commerce where the purpose is unlawful; and whether the purpose is unlawful depends upon the rule or rules established by valid state enactments. The Congress was not content to simply say that intoxicants intended to serve as the instruments of violation of valid laws of the state of delivery should not enjoy the rights, privileges and protection of interstate commerce. Doubtless, in order to avert any misapprehension in the premises, that body stated in a comprehensive, yet entirely definite way, every possible act, relation, or association with intoxicating liquors that pertinent, valid state legislation under the police power might effect, regulate, prohibit, or in any wise govern the article or its use. In the circumstances made by this federal enactment, it is not possible to soundly assert that the action of the states *in any valid use of the police power residing in the states* is a regulation of interstate commerce, and in so doing has but appropriated the valid laws of the states, affecting intoxicants, to define, as it is clearly authorized to do, the article that the Congress has forbidden lawful entry into interstate commerce."

This paragraph is, to my mind, the nearest approach to any explicit statement of the consonance of the state statute with the Webb-Kenyon Act. It cites as authority the opinion of the Circuit Court of Appeals for the Fourth Circuit, which has been

---

v. State (1910) 169 Ala. 1 and State *v.* Phillips (Miss. 1915) 67 So. 651 and authorities there cited.

So also, it is competent for the state to make criminal the possession of opium (Ah Lim *v.* Territory (1890) 1 Wash. 156 and *ex parte* Mon Luck (1896) 29 Ore. 421); lottery tickets (Ford *v.* State (1897) 85 Md. 465); miniature photographs of United States treasury notes (*ex parte* Holcomb (C. C. 1871) 2 Dill. 392), and other articles.

[48]Southern Express Co. *v.* Whittle (Ala. 1915) 69 So. 652.

[49]At p. 655.

considered above,[50] and which is contrary to the theory of this paper. The Alabama Supreme Court would seem to hold that under the Webb-Kenyon Act the state could penalize the receipt of all intoxicating liquors, the authority to do this being conferred by the word "received" in the federal statute.

Enough has been said to show the fallacy of such reasoning, but it may be recalled here that the Wilson Act was sustained only on the ground that the state was not authorized to interfere with interstate commerce until it was completed by delivery of the shipment to the consignee.[51] Now, if the Webb-Kenyon Act is considered as empowering the states to prohibit receipt of all shipments, it would seem to be a delegation of legislative power and thus open to constitutional objection, for the state would apply its laws to shipments that were still under federal protection.[52] On the contrary, the sole purpose of the Webb-Kenyon Act was to take away this federal protection from certain shipments, and this class cannot come into existence until there is an intent to violate a law of the state.

Provisions of the West Virginia law,[53] not considered by the Circuit Court of Appeals, forbid the transportation into the state of intoxicating liquors, "even when intended for personal use." The Supreme Court of the United States, in the case that came up from Kentucky, decided that such legislation was inoperative when applied to interstate shipments.[54] But, it may be objected, the Alabama legislation makes it unlawful to "receive, accept delivery of, or possess" shipments in excess of the specified amounts. How does it happen then, that this legislation is constitutional?

---

[50]State of West Virginia *v.* Adams Express Co. (C. C. A. 4th, 1915) 219 Fed. 794.

[51]*In re* Rahrer (1891) 140 U. S. 545; Rhodes *v.* Iowa (1898) 170 U. S. 412.

[52]See, for perhaps the ablest argument, the views of Senator Knox, 61st Cong. 1st Sess. Sen. Doc. 146, p. ix.

[53]Act of February 5, 1915, sec. 7.

[54]Adams Express Co. *v.* Kentucky, Oct. Term, 1914, *supra,* n. 8. In some of the state decisions and more particularly in briefs of counsel, there are references to the debates in Congress and congressional committees as to the scope of the Webb-Kenyon Bill. The quotations generally say, for example, that "the bill of itself interferes with no man's rights to import intoxicating liquors for the purpose of personal consumption." This is perfectly true, but the states may be competent, *under* the statute. On the other hand, there is no implication that the advocates of Congressional action expected the Webb-Kenyon Act to permit the states to exclude all intoxicating liquors. See Hearings before the Committee of the Judiciary (Sub-Committee 3), January 1912, p. 9ff, and Congressional Record, February 8, 1913 and December 19, 1912.

The answer may be repeated. One portion of the provision was used to justify another: the possession inhibition was held constitutional under the police power of the state, *apart from* the Webb-Kenyon Act, and then the penalization of receipt was justified *under* the Webb-Kenyon Act. Under this statute, the state may exclude from its borders all shipments in excess of the amount which it is lawful to possess at one time, and all shipments which would make the amount possessed in four consecutive weeks exceed that prescribed by the law. And if a state does not wish to go so far as to exclude absolutely such shipments (already prohibited by Congress) and make criminal any violation of the law, it may take all measures it sees fit in interfering with them upon arrival within state lines and before delivery to the consignee. There is no question of delegated power, for there is no interstate commerce. The police power of the state operates unchecked by the federal limitation previously found in the commerce clause. Furthermore, since the Webb-Kenyon Act takes away the previously existing right of the consignee to receive or accept delivery of such shipments, the state can punish the consignee or the carrier for doing what Congress has forbidden them to do.

This review of the cases and legislation leads to the conclusion that in order to make their regulations completely effective, under existing federal laws, states will be compelled to forbid the possession of more than small quantities of intoxicating liquors. If this is not done, the state has the authority to keep out only those shipments which are going to be used in violation of a valid law, and decisions granting the state the right to penalize receipt except as to these shipments are erroneous. But, if the state forbids possession of more than certain quantities of intoxicating liquors, then it can make criminal the delivery or receipt of shipments in excess of the amounts that are permitted.[55]

LINDSAY ROGERS.

UNIVERSITY OF VIRGINIA.

[55] In November the Georgia Legislature, at a special session, passed an Anti-Shipping Law (in effect May 1, 1916) which follows the Alabama statute very closely and forbids the possession of more than small quantities of liquors. The Georgia law presents no novel features that should be considered in this paper. It may be proper to add that portions of the Alabama and Georgia laws are undoubtedly invalid, for the reason that they apply to *all* instead of to *certain* shipments excluded by the Webb-Kenyon Act.